

**Board of Mgrs. of 325 Fifth Ave. Condominium v
Continental Residential Holdings LLC**

2020 NY Slip Op 32317(U)

July 16, 2020

Supreme Court, New York County

Docket Number: 154764/2012

Judge: Kelly O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 31

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THE BOARD OF MANAGERS OF 325 FIFTH AVENUE
CONDOMINIUM on its own behalf and on behalf of
individual unit owners, and 325 FIFTH AVENUE
CONDOMINIUM,

Plaintiff,

Index No.: 154764/2012

-against-

DECISION AND ORDER

Mot. Seq. 007

CONTINENTAL RESIDENTIAL HOLDINGS LLC,
DOUGLSTON DEVELOPMENT LLC, 325 FIFTH
AVENUE LLC, 325 FIFTH AVENUE COMMERCIAL
LLC, 325 FIFTH AVENUE INVESTORS, LLC,
CONTINENTIAL PROPERTIES, CLINTON
MANAGEMENT LLC, JELB 5TH AVENUE, LLC,
MARK FISCH, STEVEN FISCH, STEVEN R. CHARNO,
JEFFREY E. LEVINE, J.B. LEVINE BUILDER INC.,
D/B/A LEVINE BUILDERS, THE STEPHEN B. JACOBS
GROUP, P.C., STEPHEN B. JACOBS, FAIA, HOWARD I.
SHAPIRO & ASSOCIATES CONSULTING ENGINEERS,
P.C., JAY P. SHAPIRO, P.E., LAWRENCE KENT
SHAPIRO P.E., CANTOR SEINUK GROUP, P.C., WSP
CANTOR SENIUK, I.M. ROBBINS, P.C., MARC
ROBBINS, CANTOR & PECORELLA, INC., S&S
MANUFACTURING SKYLINE STEEL CORP. K&M
ARCHITECTUAL WINDOW PRODUCTS INC., EFCO
CORPORATION, CROSS COUNTRY CONSTRUCTION,
LLC, CROSS COUNTRY CONCRETE, LLC, SILVIAN
MARCUS, WOLF HALDENSTEIN ADLER FREEMAN &
HERZ LLP, FS PROJECT MANAGEMENT, LLC, FIRST
SERVICE RESIDENTIAL NEW YORK, LLC and CANIDO
BASONAS CONSTRUCTION CORP.,

Defendants.

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KELLY O'NEILL LEVY, J.:

In motion sequence 007 defendants FS Project Management, LLC and First Service Residential New York, LLC ("the FS Defendants") move pursuant to CPLR § 3401 and 22 NYCRR § 202.21(e) to vacate The Board of Managers of 325 Fifth Avenue Condominium's

("Plaintiff") Note of Issue and Certificate of Readiness. Alternatively, the FS Defendants move pursuant to CPLR §§ 2004, 3212(a) to extend the deadline to file a motion for summary judgment until one hundred and twenty days after all discovery is completed. The FS Defendants further move pursuant to CPLR § 3124 to compel Plaintiff to respond to the FS Defendants' Second Notice for Discovery and Inspection and Second Set of Interrogatories. The motion is unopposed.

Background

On July 20, 2012, Plaintiff commenced this action for claims arising out of alleged defects in the construction of the building located at 325 Fifth Avenue, New York, New York ("Building"). On April 15, 2015, Plaintiff named the FS Defendants in the Amended Complaint alleging, *inter alia*, breach of contract arising out of the FS Defendants' conduct as Building manager. The Amended Complaint names eighteen defendants and lists sixteen causes of action; the specific claims against each defendant differ. Plaintiff seeks similar damages from multiple defendants under causes of action related to alleged construction defects.

On August 12, 2015, the FS Defendants moved to dismiss the Complaint. This Court granted the motion in part on June 27, 2016 and the Appellate Division, First Department modified this Court's Order on April 11, 2017. Following the Order and the First Department's modification, the remaining claims against the FS Defendants in this action are the ninth cause of action for breach of contract against First Service Residential New York, LLC and the twelfth cause of action for breach of contract against FS Project Management, LLC.

On January 7, 2019, Plaintiff discontinued its claims against the Building's Sponsor, Continental Residential Holdings, LLC and its principals, alleging defective construction. The FS Defendants served Plaintiff with the Second Set of Interrogatories and Second Notice for Discovery and Inspection on August 6, 2019 which requested information related to a settlement

between Plaintiff and the Sponsor Defendants. Plaintiff served its responses on September 13, 2019. Plaintiff's responses objected to the request for settlement information on the basis of relevancy and confidentiality.

On November 13, 2019, Plaintiff's counsel informed this Court that Plaintiff had settled its claim in principle against Candido Basonas Construction Corp. ("Basonas"). The FS Defendants sent a letter to Plaintiff requesting information regarding the settlement agreement between Plaintiff and Basonas. Plaintiff objected to disclosure on grounds of confidentiality.

Plaintiff filed a Note of Issue and Certificate of Readiness for Trial on December 20, 2019.

Analysis

"[A] note of issue should be vacated when [it] is based upon a certificate of readiness which contains an erroneous fact, such as that discovery has not been completed." *Ruiz v. Park Gramercy Owners Corp.*, 182 A.D.3d 471, 471 (1st Dep't 2020) (quoting *Savino v. Lewittes*, 160 A.D.2d 176, 177 (1st Dep't 1990)) (alterations original); *see* 22 NYCRR 202.21(e). The Note of Issue in this case is based upon the Certificate of Readiness filed on December 20, 2019 which states "[t]here are no outstanding requests for discovery, subject to the Addendum annexed hereto as Exhibit A." NYSCEF Doc. No. 318. Exhibit A, referenced in the Certificate of Readiness, incorporates the December 11, 2019 Status Conference Order. The Status Conference Order states "[t]he parties reserve their rights to make motions to compel covering settlement..." NYSCEF Doc. No. 319. Accordingly, the Certificate of Readiness upon which the Note of Issue is based does not contain erroneous facts regarding the status of discovery related to settlement agreements, and the motion to vacate the Note of Issue is denied. *See Cuprill v. Citywide Towing & Auto Repair Servs.*, 149 A.D.3d 442, 442 (1st Dep't 2017) ("Trial courts are authorized, as a matter of

discretion, to permit post-note of issue discovery without vacating the note of issue, so long as neither party will be prejudiced.”).

In regards to the FS Defendants’ motion to compel disclosure, “[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.” CPLR § 3101(a). The words “material and necessary” are interpreted liberally to mean disclosure that is relevant to a claim or defense. *Kapon v. Koch*, 23 N.Y.3d 32, 38 (2014). The FS Defendants seek settlement disclosure to assess the alleged damages resulting from Plaintiff’s breach of contract claim; Plaintiff objects to the disclosure of settlement information on the grounds of relevancy. A clear demonstration of damages is a *prima facie* element of a claim for breach of contract. See, e.g. *Milan Music, Inc. v. Emmel Commc’ns Booking, Inc.*, 37 A.D.3d 206, 206 (1st Dep’t 2007) (“Without a clear demonstration of damages, there can be no claim for breach of contract.”) Thus, Plaintiff’s relevancy objection is unfounded as the disclosure of settlements of claims arising out of the same conduct as Plaintiff’s claims against the FS Defendants is “material and necessary” to the breach of contract claims. *Oowski v. AMEC Const. Mgmt., Inc.*, 69 A.D.3d 99, 106-07 (“settlement...directly bears on the underlying issue of fault and damages.”).

Plaintiff further objects to settlement disclosure on the grounds of confidentiality. This objection is likewise unfounded since “disclosure of terms of a settlement agreement by a settling party to a nonsettling party may be appropriate, despite the presence of a confidentiality clause in the agreement, where the terms of the agreement are ‘material and necessary’ to the nonsettling party’s case.” *Id.* Consequently, Plaintiff has failed to respond to the FS Defendants’ Second Notice for Discovery and Inspection and Second Set of Interrogatories. The motion to compel

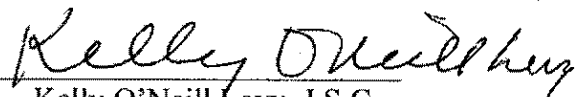
Plaintiff's response pursuant to CPLR § 3124 is granted. Plaintiff is directed to produce the requested discovery by July 31, 2020.

This Court may extend the time fixed by the December 11, 2019 Status Conference Order for filing a motion for summary judgment upon a showing of good cause for extension. *See* CPLR § 2004. Outstanding discovery requests constitutes good cause for extending the time to move for summary judgment. *See, e.g. Kellogg v. All Saints Hous. Dev. Fund Co.*, 146 A.D.3d 615, 616 (1st Dep't 2017) (holding that the motion court erred in not granting the movant's motion to strike the note of issue or extend the time to move for summary judgment where movant "would otherwise be deprived of a reasonable opportunity to complete discovery."); *Fraser v. 301-52 Townhouse Corp.*, 57 A.D.3d 416, 420 (1st Dep't 2008) (holding that the nonmoving party's delayed disclosure amounted to good cause for the moving party's delay in making a motion for summary judgment). The current deadline to move for summary judgment is within sixty days after the last deposition and the Court declines to modify that deadline.

This constitutes the decision and order of this Court.

Date: July 16, 2020

ENTER:


Kelly O'Neill Levy, J.S.C.

KELLY O'NEILL LEVY
JSC